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Attorneys for Plaintiff and the Class

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

KEVIN PARK on behalf of himself and all others similarly situated,	**CASE NO.: '12CV1380 LAB JMA**
Plaintiff,	**CLASS ACTION COMPLAINT FOR:**
vs.	**1. UNFAIR BUSINESS PRAC. ACT VIOL** **2. CONN. UNFAIR TRADE PRAC. ACT VIOL**
WEBLOYALTY.COM, INC., a Delaware corporation; DOES 1 through 50, inclusive,	**[JURY TRIAL DEMANDED]**
Defendants.	

Plaintiff Kevin Park, on behalf of himself and all others similarly situated, alleges upon personal knowledge, information and belief as follows:

I. WEBLOYALTY CHARGES CONSUMERS' CREDIT AND DEBIT ACCOUNTS WITHOUT PROPER AUTHORIZATION VIA THE DATA PASS PROCESS IN VIOLATION OF THE RESTORE ONLINE SHOPPERS' CONFIDENCE ACT ("ROSCA")

1. Plaintiff Park brings this class action against Defendant Webloyalty.com, Inc. for unlawfully charging customers' credit and debit cards to generate remarkable monthly profits. As more fully explained below, Webloyalty operates an online marketing scam that preys on unsuspecting consumers. While consumers are attempting to complete purchase transactions

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from online retailers, such as Gamestop, Webloyalty will cause consumers to unknowingly "enroll" in its fee-based membership reward programs. Thereafter, Webloyalty will — without any authorization — charge monthly membership fees to consumers' credit and debit cards. The key to the scam is that consumers never provide their debit or credit card numbers, or billing information directly to Webloyalty. Webloyalty gets this information from its numerous online retailer partners, like Gamestop, through a deceptive practice that is commonly referred to as "data pass." Webloyalty uses the information to steal $10 to $12 per month in purported membership fees from consumers and then splits the proceeds with its online retail partners.

II. THE UNITED STATES SENATE INVESTIGATED WEBLOYALTY'S DATA PASS PRACTICES

2. Because of the deceptive nature of "data pass," Webloyalty was the direct target of a lengthy investigation by the United States Senate. On November 16, 2009, the Senate released a preliminary report, indicating that Webloyalty used "highly aggressive sales tactics to charge millions of American consumers for services the consumers do not want and do not understand they have purchased."

> These tactics involve selling unfamiliar membership programs to consumers who are in the process of purchasing familiar products offered by trusted websites…. In exchange for "bounties" and other payments, reputable on-line retailers agree to let [Webloyalty] sell club memberships to consumers as they are in the process of buying movie tickets, plane tickets, or other online goods and services. The sales tactics used by [Webloyalty] exploit consumers' expectations about the online 'checkout' process.
>
> With the cooperation of their online 'partners,' [Webloyalty] insert[s] sales offers into the 'post-transaction' phase of an online purchase, after consumers have made a purchase but before they have completed the sale confirmation process. These offers generally promise cash back rewards and appear to be related to the transaction the consumer is in the process of completing. Misleading 'Yes' and 'Continue' buttons cause consumers to reasonably think they are completing the original transaction, rather than entering into a new, ongoing financial relationship with a membership club operated by [an unrelated third party].
>
> Even more misleading and confusing is the 'data pass' process [Webloyalty] and their partners use to automatically transfer consumers' credit or debit card information from the familiar web seller to the third-party membership club. Passing consumers' billing information directly to [Webloyalty], without requiring consumers to re-enter it, deprives consumers of notice that they are entering a new, ongoing financial relationship with an unfamiliar company. Preliminary Report at i-ii.

4. A hallmark of the Committee's findings is that Webloyalty' practice is deceptive and misleading because "**[p]assing consumers' billing information directly to Webloyalty, without requiring consumers to re-enter it, deprives consumers of notice that they are entering into a new, ongoing financial relationship with an unfamiliar company.**" *Id*. at ii. The Committee reasoned that "whenever preacquired account information enables a seller or telemarketer to cause charges to be billed to a consumer's account without the necessity of persuading the consumer to demonstrate his or her consent by divulging his or her account number, the customary dynamic of offer and acceptance is inverted." *Id*. at 4.

5. Webloyalty strongly discouraged its partners, like Gamestop, from requiring customers to re-enter their debit or credit card numbers as part of the enrollment process because Webloyalty did not want customers to realize that they were entering into a separate payment obligation. Preliminary Report, at 5.

6. Webloyalty's partners understood that their customers were being intentionally exposed to deceptive practices. In fact, "Webloyalty … agreements typically give partners a financial incentive to expose their shoppers to aggressive third-party offers. Generally, the more aggressively an e-commerce company is willing to market Webloyalty's membership clubs to its customers, the more money it will earn." *Id*. at 14. But "[d]espite having clear evidence showing consumers were being misled, the companies continued to use a combination of three aggressive sales tactics – post-transaction marketing, the "data pass" process, and negative options – to enroll online consumers in their membership programs or discount clubs." Suppl. Report, at 2.

III. ROSCA PROTECTS CONSUMERS FROM WEBLOYALTY'S DATA PASS PRACTICES

7. On December 29, 2010, and in direct response to the Senate investigation on Webloyalty's use of "data pass" to obtain consumers' credit and debit card information, President Obama signed the Restore Online Shoppers' Confidence Act ("ROSCA"). ROSCA plainly outlaws the "data pass" scam employed by Webloyalty and requires full disclosure of the goods and services offered and their costs. Most significantly, ROSCA specifically forbids online merchants, like Webloyalty, from charging consumers' credit or debit cards unless the merchant

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obtained directly from the consumer "the full account number of the account to be charged; and the consumer's name and address and a means to contact the consumer."

8. Congress made the following declarations of policy when passing ROSCA:

> (4) The Committee showed that, in exchange for "bounties" and other payments, hundreds of reputable online retailers and websites shared their customers' billing information, including credit card and debit card numbers, with third party sellers through a process known as "data pass". These third party sellers in turn used aggressive, misleading sales tactics to charge millions of American consumers for membership clubs the consumers did not want.
>
> (5) Third party sellers offered membership clubs to consumers as they were in the process of completing their initial transactions on hundreds of websites. These third party "post transaction" offers were designed to make consumers think the offers were part of the initial purchase, rather than a new transaction with a new seller.
>
> (6) Third party sellers charged millions of consumers for membership clubs without ever obtaining consumers' billing information, including their credit or debit card information, directly from the consumers. Because third party sellers acquired consumers' billing information from the initial merchant through "data pass," millions of consumers were unaware they had been enrolled in membership clubs.
>
> (7) The use of a "data pass" process defied consumers' expectations that they could only be charged for a good or a service if they submitted their billing information, including their complete credit or debit card numbers.

IV. WEBLOYALTY'S DATA PASS PRACTICES VIOLATE ROSCA

9. Despite being the direct target of the United State Senate investigation, and in the face of express legislative findings that its "customers" did not authorize the charges, Webloyalty brazenly continues to charge consumers' debit and credit cards without express authorization in direct violation of ROSCA. On information and belief, after ROSCA passed, Webloyalty made no attempt to obtain the express consent, including the full account numbers and billing addresses from consumers whose credit and debit card information was obtained by Webloyalty via data pass.

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V. JURISDICTION AND VENUE

10. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1332(d), 1453, and 1711-1715, the Class Action Fairness Act of 2005, because the amount in controversy exceeds $5 million and because numerous class members are citizens of a state different from Webloyalty. This Court has supplemental jurisdiction over state law claims pursuant to 28 U.S.C. § 1367.

11. Pursuant to 28 U.S.C. § 1391(b), this Court is the proper venue for this action because this Court has personal jurisdiction over Webloyalty under 28 U.S.C. § 1391(c), and a substantial amount of the events giving rise to the claim occurred in this District.

V. THE PARTIES

12. Park is an individual who at all times mentioned herein resided, and continues to reside, in San Diego, California.

13. Webloyalty.com, Inc. is a Delaware corporation with its offices located at 530 Lytton Ave Ste 300, Palo Alto, CA 94301-1541 and 595 Market St. Ste. 1300, San Francisco, CA 94105-2820.

14. Park and the class are ignorant about the true names of defendants sued as DOES 1 through 50, inclusive, and their wrongful conduct, and therefore sue these defendants by fictitious names. Park and the class will seek court leave to amend this complaint to allege their true names and capacities when ascertained. Park and the class allege on information and belief that at all relevant times, DOES 1-50, inclusive, were agents, servants, employees, representatives, partners, and related or affiliated entities of defendants, and in doing the things hereinafter mentioned, were acting in the course and scope of their agency, employment, or retention with Webloyalty's permission, consent, authority and ratification.

VI. PARK'S EXPERIENCE

15. Around May 2009, Park purchased a gift certificate from Gamestop.com for his son. Park recalls seeing a coupon to save money on his next purchase. Park clicked on the coupon and recalls a pop-up window that directed him to enter his email address and click on an acceptance button. Believing that he was providing his email address to receive the promised

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coupon by email and return to the Gamestop.com confirmation page, Park recalls entering his email address and clicking on the acceptance button. By providing an email address and clicking on the acceptance button, Park purportedly joined a fee-based membership program, known as Complete Savings. Park, however, never intended to and did not want to join any membership program. Park did not even realize that he had been redirected away from Gamestop's website to Webloyalty's website due to the deceptive nature of the entire marketing scheme.

16. Park had no idea that he joined Complete Savings and authorized Webloyalty to charge his credit card for monthly membership fees because, among other things: Park thought he was still transacting business with Gamestop, a company that he had used in the past and trusted; Park thought he was being asked for his email address to receive the promised coupon; and Park was never asked to enter any billing information, such as a credit or debit card number or billing address, to alert him that he was entering a separate financial transaction with a third party.

17. Around April 2011, Park discovered unauthorized charges to his credit card. After investigating the charges, he contacted his bank and then Webloyalty to stop the charges and cancel his Complete Savings membership. When he spoke with Webloyalty, he discovered that the company did not even have his name or contact information, but instead had his minor son's name and contact information. Even though Webloyalty did not have Park's personal information, it nevertheless charged his account on multiple occasions for fees associated with Complete Savings.

VII. PARK'S CLASS ACTION ALLEGATIONS

18. **The Class**: This lawsuit is brought on behalf of an ascertainable nationwide class consisting of: All persons residing in the United States who (1) did not directly provide their credit card or debit card account number, address, or contact information to Webloyalty, and (2) had their credit or debit card charged, or bank account debited, by Webloyalty for a Complete Savings membership, or any other club membership program maintained by Webloyalty, including Reservation Rewards, Travel Values Plus, WalletShield, Buyer Assurance, and Shopper Discounts & Rewards, at any time since December 29, 2010.

19. **The Subclass**: All class members who reside in California.

20. **Excluded from Class and Subclasses**: Excluded from the class and subclass is Webloyalty, its corporate parents, subsidiaries and affiliates, officers and directors, any entity in which Webloyalty has a controlling interest, and the legal representatives, successors or assigns of any such excluded persons or entities, and Park's attorneys. Also excluded from the class and subclass are any judges presiding over these proceedings and their immediate family.

21. **Numerosity**: The class and subclass members are so numerous that joinder of all members is impracticable. While the exact numbers are unknown to Park at this time, Park is informed and believes that the class and subclass consists of thousands of individuals. Members are readily ascertainable through appropriate discovery from records maintained by Webloyalty and its agents.

22. **Superiority**: A class action is superior to other available methods for the fair and efficient adjudication of this controversy because joinder of all members is impracticable, the likelihood of individual class members prosecuting separate claims is remote and individual members do not have a significant interest in individually controlling the prosecution of separate actions. No difficulty will be encountered in this case's management to preclude maintenance as a class action.

23. **Common Questions of Law and Fact Predominate**: Questions of law and fact common to the class predominate over questions affecting only individuals. Among the common questions are:

a. whether class members can lawfully authorize Gamestop or any other online retailer to transfer their credit card or debit card information to Webloyalty merely by providing their email address;

b. whether class members can lawfully authorize Webloyalty to charge or bill their credit or debit cards merely by providing their email and zip code;

c. whether Defendants conduct violates the rules and terms of use established by Credit Card companies such as MasterCard, Visa, and American Express;

d. whether Webloyalty violated ROSCA;

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e. whether Webloyalty engaged in unfair or unlawful business practices;

f. whether Park and the class are entitled to declaratory relief;

g. whether Park and the class are entitled to injunctive relief; and

h. whether Park and the class are entitled to restitution, actual damages and punitive damages.

24. **Typicality**: Park's claims are typical of other class members' claims because they, like every other class member, were exposed to virtually identical conduct.

25. **Adequacy**: Park's can fairly and adequately represent the class' interests; he has no conflicts of interest with other class members, and he retained counsel competent and experienced in class action and complex civil litigation.

VIII. CLAIMS FOR RELIEF

FIRST CLAIM
Unlawful Business Practices in Violation of Cal. Bus. & Prof. Code § 17200, et seq.
Brought by Park and the Subclass

26. Park refers to and incorporates by reference the above paragraphs.

27. ROSCA bans the "data pass" process by prohibiting initial merchants from disclosing a credit card, debit card, bank account, or other financial account number, or other billing information that is used to charge a customer, to any post-transaction third party seller for use in an Internet-based sale of any goods or services.

28. ROSCA also requires post transaction third party sellers to fully disclose the goods and services being offered and their costs, and severely restricts use of the "negative option" feature. Most significantly, before post transaction third party sellers can charge consumers' debit and credit cards, ROSCA requires them to receive express informed consent. Post-transaction third party sellers are required to obtain from consumers their full account number, name, address, and contact information. They also must require consumers to perform an additional affirmative action that shows consent.

29. Webloyalty is a post-transaction third party seller as defined under ROSCA because it sells access to membership clubs on the internet, it solicits this service on the internet via online retail websites, like Gamestop, after Park and the subclass initiate a transaction on the

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retail website. Webloyalty is not the initial merchant, a subsidiary or corporate affiliate of the initial merchant or a successor of those entities.

30. Before ROSCA's enactment, Webloyalty's acts and practices were unfair because, among other things, Webloyalty charged consumers' credit and debit cards without obtaining express informed consent and by using information obtained through the data pass process. Webloyalty engaged in these acts and practices well before the enactment of ROSCA. The Senate expressly condemned these acts and practices, finding them to be deceptive, unfair and fraudulent.

31. After ROSCA's enactment, Webloyalty's acts and practices became unlawful as well. Webloyalty continues to charge consumers' credit and debit cards using information obtained through the data pass process and without obtaining directly from consumers their full account number, name, address, and contact information as required under ROSCA.

32. Webloyalty engages in unfair and unlawful business practices by charging consumers' payment cards using information obtained via data pass and being unjustly enriched from the charges.

33. As a direct and proximate cause of Webloyalty's conduct, Park and the subclass suffered unauthorized charges to their credit and debit cards.

34. Park and the subclass seek equitable relief because they have no other adequate remedy at law. Absent equitable relief, Webloyalty will continue to injure consumers, reap unjust enrichment, and harm the public's interest, thus engendering a multiplicity of judicial proceedings. Additionally, Park and the subclass seek judgment against Webloyalty for preliminary and permanent injunctive relief, restitution, and/or proportional disgorgement of profits earned as a result of the conduct alleged herein, along with interest, attorneys' fees and costs under Cal. Code Civ. Proc. § 1021.5, the substantial benefit doctrine, the common fund doctrine or other authority requiring Webloyalty to pay attorneys' fees and litigation expenses.

SECOND CLAIM
Violation of Connecticut Unfair Trade Practices Act
Brought by Park and the Class

35. Park refers to and incorporates by reference the above paragraphs.

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36. The Connecticut Unfair Trade Practices Act ("CUTPA") was enacted to prohibit, and protect persons from deceptive, fraudulent and unfair conduct. A cause of action accrues when one suffers "an ascertainable loss of money or property, real or personal, as a result of the use of employment of a method, act or practice" that is deceptive, fraudulent or unfair. *See* Connecticut General Statutes §§ 42-110(b), 42-110g.

37. Before the enactment of ROSCA, Webloyalty's acts and practices were unfair because, among other things, Webloyalty charged consumers' credit and debit cards without obtaining express informed consent and by using information obtained through the data pass process. Webloyalty engaged in these acts and practices well before the enactment of ROSCA. The Senate expressly condemned these acts and practices, finding them to be deceptive, unfair and fraudulent.

38. After the enactment of ROSCA, Webloyalty's acts and practices became unlawful since Webloyalty continues to charge consumers' credit and debit cards using information obtained via data pass and without obtaining directly from consumers their full account number, name, address, and contact information as required under ROSCA. Webloyalty does these acts in the conduct of trade and/or commerce.

39. As alleged above, Webloyalty's conduct violates ROSCA, which is expressly treated as a violation of the Federal Trade Commission Act regarding unfair or deceptive acts or practices.

40. Webloyalty's conduct offends public policy and is immoral, unethical, oppressive or unscrupulous.

41. Webloyalty's conduct also caused Park and the class substantial and ascertainable money loss. Their injury is not outweighed by any countervailing benefits to consumers or competition that the practice produces; and could not reasonably have been avoided

42. Park and the class seek judgment against Webloyalty for preliminary and permanent injunctive relief, restitution, and/or proportional disgorgement of profits earned as a result of the conduct alleged herein, along with interest, punitive damages, and attorneys' fees

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and costs.

VII. PRAYER FOR RELIEF

Park, the class, and the subclass pray for judgment against Webloyalty as follows:

A. An order certifying the class and subclass and designating Park as the class Representative and Park's counsel as class counsel;

B. That the Court preliminarily and permanently enjoins Webloyalty from engaging in the conduct alleged herein;

C. Other injunctive and declaratory relief as may be appropriate;

D. Restitution and disgorgement any ill-gotten profits from Webloyalty to the extent permitted by applicable law, together with interest thereon from the date of payment;

E. For statutory damages according to proof;

F. For general damages according to proof;

G. For special damages according to proof;

H. For exemplary or punitive damages;

I. A declaration that Webloyalty is financially responsible for notifying the class and subclass about the pendency of this action;

J. Reasonable costs and attorneys' fees;

K. Statutory pre-judgment interest; and

L. For such other relief as the Court may deem proper.

Dated: June 7, 2012 **PATTERSON LAW GROUP APC**

By: *_/s/ James R. Patterson_*
James R. Patterson
Alisa A. Martin
Attorneys for Plaintiff and the Class

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DEMAND FOR JURY TRIAL

Plaintiff Kevin Park, on behalf of himself, the class and subclass, demand a jury trial for all of the claims so triable.

Dated: June 7, 2012

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By: *_/s/ James R. Patterson_*
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Attorneys for Plaintiff and the Class